



REPUBLIC OF KENYA



**Aden & another v Wanyama (Civil Appeal E822 of 2024)
[2025] KEHC 6149 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E822 OF 2024**

**TW OUYA, J
MAY 15, 2025**

BETWEEN

IBRAHIM ADEN 1ST APPELLANT

ADAN MOHAMED NOORU 2ND APPELLANT

AND

ERICK WANYAMA RESPONDENT

*(An appeal from the judgement of Hon. Rawlings Liluma Musiega
delivered on 12th June 2024 in Chief Magistrates Court Milimani)*

RULING

1. Before court is a notice of motion application for stay of execution of the judgement of Hon. Rawlings Liluma Musiega delivered on 12th June 2024 in Chief Magistrates Court Milimani dated 16th August 2024 by Ibrahim Aden, the applicant herein seeking for orders that:
 - i. Spent.
 - ii. Spent
 - iii. Spent.
 - iv. That the court do grant stay of execution pending the hearing and determination of the Appeal.
 - v. That cost of this application be provided for.
2. The application dated 16th August 2024 by Ibrahim Aden, is supported by grounds and supporting affidavit sworn by the applicant on the same date to the effect that the respondent initiated a process of execution during the pendency of the applicant's application for stay dated 16th July 2024 which had



not been certified urgent, was slated for hearing on the 26th July 2024 but failed to take off, prompting the filing of the instant application.

3. The respondent also failed to the applicant's written proposal to pay Kshs. 250,000 in a joint interest earning account to act as security for stay of execution. This makes the applicant apprehensive that failure to grant stay of execution pending the hearing and determination of this appeal will lead to miscarriage of justice.
4. The application is founded on order 42 rule 2 of the civil procedure rules and the authority of *Vichada vs Wanjiru & Another (Civil Appeal E 152 of 2023)* KEHC 23261 (KLR) which stated that courts have continued to grant stay of execution on condition that the appellant deposits half of the decretal sum.
5. This application was opposed by the respondent citing grounds inter alia that: there is no evidence of substantial loss, there is no decree yet and that the trial court judgement inspires no chance of appeal.
6. The application was canvassed by way of written submissions by the rival parties through their counsel. Counsel for the appellant based his arguments in the stated grounds and and) narrowed down on the issue as to whether stay pending hearing and determination of this appeal is merited. He cites several authorities including *Nicholas Kiptoo Arap Korir Salat vs IEBC and 7others (2014) eKLR*, *Gichaba v Wanjiru & Another Civil appeal (E152 of 2023) (2023) KEHC*, *University of Nairobi vs Florence K Alusa (2021) eKLR* and others. Counsel states categorically the applicant's willingness to deposit security for performance as will be ordered by the court.
7. The respondent has narrowed down on the issue that there is no evidence of substantial loss and cites the authority of *Kenya Shell Ltd & Another (1986) KLR 410* and others stating that without evidence of alleged or proved substantial fall the motion must fail and be dismissed with costs to the respondent.
8. Having carefully considered the parties pleadings, grounds and supporting evidence together with the rival written submissions with all the authorities cited, I find that the issue arising for my determination is whether stay pending hearing and determination of this appeal is merited.
9. The conditions to be considered for granting stay of execution pending appeal are laid down in the provisions of 42 Rule 6 of the Civil Procedure rules as restated in the case of *Hamisi Juma Mbaya v Amakecho Mbaya [2018] eKLR* where it was held: -

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

- i. Substantial loss may result to the applicant unless the order is made.
- ii. The application has been made without unreasonable delay, and
- iii. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

10. The appellant has indicated that he stands to suffer substantial loss of the stay orders are not granted while the respondent argues that the appellant has not provided any proof of substantial loss. The court of appeal in *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & another (2006) eKLR*, held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then



shift to the respondent to show what resources he has since been that this is a matter which is peculiarly within his knowledge.”

11. Be that as it may, the issue of likelihood to suffer substantial loss cannot be addressed in isolation from the issue of protection of the substratum of an appeal. In *RWW v EKW* (2019)eKLR the court laid down the principle that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered “

12. From the foregoing, plays out the position that the applicant stands to be locked out of the seat of justice and may suffer undue prejudice if stay of execution pending hearing and determination of this appeal is not granted, that the essence of the desired stay orders is to preserve the substratum of the appeal and, that the applicant has expressed willingness to make a deposit for security. These are in line with the conditions for grant of stay of execution provided.
13. This court notes further that the impugned judgement was delivered on 12th June 2024, the instant application is dated 16th August 2024 while an earlier application for stay is dated 16th July 2024. The application therefore meets the threshold for having been made without unreasonable delay.
14. As to the requirement for security for the due performance of the court takes into account that the applicant expressed willingness in this application and also in writing to the respondent to deposit security on terms ordered by the court. Counsel relied on the authority of *Gichaba v Wanjiru & another (Civil Appeal E152 of 2023)* [2023] KEHC 23261 (KLR), where it was stated that the court has granted similar orders of stay of execution on condition that the applicant deposits a percentage of the decretal sum.
15. Similarly, in the case of *Focin Motorcycle Co. Limited V Ann Wangui & Another* [2018] eKLR the court held that:-

“Where the applicant proposed to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of Judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security and has therefore satisfied this ground for stay.”

16. The court in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR stated that the court considers the circumstances of each case before granting an order for stay of execution and emphasizes that the overarching principle guiding the court in deciding whether to grant stay is whether such an order would serve the ends of justice. Flowing from the above, this court finds that this application meets the threshold for grant of stay of execution.

Determination

17. In the upshot of the above this court in exercise of its discretion and in the interest of justice, grant the Applicant an Order for stay of execution of judgement/Decree delivered on 12th June 2024 in Nairobi CMCC NO. E3286 of 20 pending hearing and determination of the applicant’s appeal on the following terms:
- i. Applicant to deposit Kshs. 300,000 being part of the decretal sum in an interest-bearing account in the joint names of the applicant and respondent counsel.



- ii. Applicant to pay to the respondent through his counsel Kshs. 80,000 being the award for future medical expenses within 30 days from the date hereof.
- iii. The above escrow account to be opened and monies deposited within 30 days from the date hereof.
- iv. Orders i. ii. and iii above will lapse automatically upon non-compliance.
- v. No orders as to costs.

DATED, SIGNED AND DELIVERED ELECTONICALLY THIS 15TH DAY OF MAY, 2025.

HON. T. W. OUYA

JUDGE

